UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10434

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE ERNESTO ESPINOSA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:90-CR-254-H)

August 15, 1995

Before WISDOM, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Jose Espinosa appeals from his conviction for conspiracy and attempted possession of cocaine. We **AFFIRM**.

I.

Espinosa, who had served eight years in prison for robbery, was telephoned by, and shortly thereafter met with, Louis Aguilar, a former fellow-inmate and confidential Government informant, about arranging a drug deal. Espinosa found two buyers, the Salas brothers, and arranged a sale between them and an undercover

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Government agent (again, unknown to Espinosa). Following the staged sale, Espinosa was arrested with the Salas brothers.

At trial, Espinosa claimed entrapment, and the district judge gave an instruction on it. Nonetheless, Espinosa was found guilty of conspiracy and attempted possession of cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1).

II.

Espinosa appeals on the basis of his entrapment defense and the corresponding jury instruction.

A.

In claiming entrapment, Espinosa asserted at trial that he was not predisposed to commit the crime. Therefore, he essentially challenges the sufficiency of the Government's evidence of predisposition. *E.g.,* ***United States v. Byrd***, 31 F.3d 1329, 1335 (5th Cir. 1994), *cert. denied,* 115 S. Ct. 1432 (1995). Our review is limited; we must "accept every fact in the light most favorable to [the] jury's guilty verdict, and may reverse only if no rational jury could have found predisposition beyond a reasonable doubt". ***Id***.[2]

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[2] Espinosa did not renew his motion for acquittal at the close of all the evidence. Under these circumstances, we would normally review a sufficiency of the evidence challenge only for whether there has been a manifest miscarriage of justice. *E.g.,* ***United States v. Inocencio***, 40 F.3d 716, 724 (5th Cir. 1994). Espinosa urges, however, that a motion would have been pointless at the close of all the evidence because the trial judge, on his own motion, granted an acquittal on the third count (weapons charge); he asserts that, therefore, the judge had already considered and decided any motion he might have made at that point. Furthermore, the district judge indicated his inclination not to even charge the jury on entrapment. From this record, it appears that Espinosa's objection would have been an "empty ritual"; therefore, we will

Espinosa relies on the Supreme Court's holding in ***Jacobson v. United States***, 112 S. Ct. 1535, 1540 (1992), that "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute". The Government must show that the defendant was predisposed to commit the crime before being contacted by Government agents. ***Id***.

Espinosa testified that, when Aguilar, whom he considered a friend, first met with him, he (Espinosa) was suffering extreme financial difficulty; and that Aguilar informed Espinosa that, if he could only find some buyers, Espinosa could make $1000 per kilogram.[3] Although Espinosa located a buyer (he acknowledged at trial that he knew of individuals who were "doing some [drug] business"), he testified that he had no prior experience in drug transactions; that he did not have the capability, on his own, to organize a drug deal; and that he would not have undertaken any

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apply the standard sufficiency of the evidence review. *See* ***United States v. Pennington***, 20 F.3d 593, 597 n.2 (5th Cir. 1994).

[3] Aguilar initially contacted Espinosa by telephone in April 1990. Espinosa recounted the conversation:

> Louis [Aguilar] called over here and I called him back and he said how are things over here and he said he wanted to come over here and talk to me[.] I said "About what?" He said "Well, remember that [in prison] we used to talk about some drugs" and I said, well, I told him "Man, I don't know nobody or nothing like that."

In spite of Espinosa's telephonic disclaimer, he met with Aguilar the next day, and agreed to attempt to locate drug buyers.

illegal activity without Aguilar's promise of tremendous financial rewards.

Notwithstanding Espinosa's assertions, our court holds that "[t]he active, enthusiastic participation on the part of the defendant is enough to allow the jury to find predisposition". ***United States v. Rodriguez***, 43 F.3d 117, 126-27 (5th Cir.), *cert. denied*, 115 S. Ct. 2260 (1995); ***United States v. Hudson***, 982 F.2d 160, 162 (5th Cir.), *cert. denied*, 114 S. Ct. 100 (1993). *See also,* ***United States v. Sandoval***, 20 F.3d 134, 138 (5th Cir. 1994) ("Although an eager acceptance of an opportunity to commit some illegal act may prove predisposition, ***Jacobson*** clarified the boundaries of such substituted proof, rejecting it where significant and persistent government encouragement was required to induce the crime". (footnote omitted)). In this regard, the record reveals that, after meeting with Aguilar, Espinosa immediately began searching for buyers, offered his mother's home as a site for the drug transaction, made multiple attempts to complete a deal, and actively negotiated on behalf of the buyers. From this evidence, the jury could have concluded reasonably that Espinosa enthusiastically participated in the crime, and, thus, had the requisite predisposition.

B.

Espinosa challenges the district court's refusal to use his requested instruction in charging the jury on entrapment. The court's instruction, Espinosa asserts, did not adequately instruct the jury that it must find predisposition *before* Espinosa was

contacted by Aguilar.[4] We review this claim only for abuse of discretion, and will reverse only if: (1) the requested instruction is a correct statement of the law, (2) the court's instruction did not substantially cover the requested instruction, and (3) the failure to issue the requested instruction impaired the defendant's ability to present his defense. *E.g.*, ***United States v. Pennington***, 20 F.3d 593, 600 (5th Cir. 1994).

The Government counters that any variation between Espinosa's instruction and the trial court's is legally insignificant, and that the court gave a correct instruction on entrapment. Espinosa disagrees, claiming that the court's instruction is nearly identical to one disapproved by the Ninth Circuit in ***United States v. Mkhsian***, 5 F.3d 1306, 1311 (9th Cir. 1993). The ***Mkhsian*** instruction read:

> In this case, each defendant asserts that he was a victim of entrapment as to the offenses charged in this indictment. Where a person has no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment and, as a matter of policy, the law forbids his conviction in such a case.
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> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that the government agent provides what appears to be a favorable opportunity is not entrapment.

Id. at 1310. The Ninth Circuit struck down the instruction because the phrase "already has the readiness" did not sufficiently direct

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[4] Espinosa requested an instruction that the jury must find predisposition "prior to first being approached by government agents".

the jury's consideration to the time "before the Government intervened". ***Id***. at 1311. It appears that the crux of the Ninth Circuit's concern was that a Government agent may lay coercive "groundwork" through contact with a defendant, prior to actually soliciting cooperation in criminal activity. ***Id***. And, as ***Jacobson*** directs, the defendant must have criminal predisposition prior to the contact, not merely the solicitation, of the Government agent.

The concerns driving the opinion in ***Mkhsian*** are not present here. The court's instruction was more elaborate than that in ***Mkhsian***. Although the beginning of the instruction more or less tracks the language of that in ***Mkhsian***, the court went on to instruct:

> If, then, you should find beyond a reasonable doubt from all the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit a crime such as charged in the indictment, whenever the opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then you should find that the defendant is not a victim of entrapment.
>
> On the other hand, if you have a reasonable doubt that the defendant would have committed the offenses charged without the government's inducements, you must acquit the defendant.

The references to the period of time "before anything at all occurred", coupled with "without the government's inducements", extinguish any concern that the jury might consider Espinosa's predisposition before solicitation but *after* the initial contact by Aguilar. *See* ***United States v. Brown***, 43 F.3d 618, 627-28 (11th Cir. 1995) (upholding similar instruction).

III.

For the foregoing reasons, the conviction is

AFFIRMED.